

E-FILED on December 18, 2006

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 Attorneys for Debtors

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case Nos. BK-S-06-10725 LBR
 Case Nos. BK-S-06-10726 LBR
 Case Nos. BK-S-06-10727 LBR
 Case Nos. BK-S-06-10728 LBR
 Case Nos. BK-S-06-10729 LBR
 Chapter 11

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:
☒ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA First Trust Deed Fund, LLC

**SUPPLEMENT TO DEBTORS'
 COMBINED MOTION *IN LIMINE*
 AND MEMORANDUM IN SUPPORT
 REGARDING OBJECTION OF USA
 INVESTMENT PARTNERS, LLC,
 JOSEPH MILANOWSKI AND
 THOMAS HANTGES TO
 CONFIRMATION OF THE
 DEBTORS' THIRD AMENDED
 JOINT CHAPTER 11 PLAN OF
 REORGANIZATION AND THE
 DECLARATION OF VICTORIA S.
 LOOB**

Date: December 19, 2006
 Time: 9:30 a.m.

SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
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Debtors USA Commercial Mortgage Company (“USA Mortgage”), USA Securities, LLC (“USA Securities”), USA Capital Realty Advisors, LLC (“USA Realty”), USA Capital Diversified Trust Deed Fund (“USA Diversified”), and USA Capital First Trust Deed Fund (“USA First”) (collectively referred to as “Debtors”), by and through their counsel, Ray Quinney & Nebeker P.C., hereby supplements Debtors’ Combined Motion *In Limine* (Docket No. 2149) and requests entry of an Order pursuant to Fed. R. Civ. P. 37(b) and (d), made applicable by Fed. R. Bankr. P. 7037 and Fed. R. Bankr. P. 9014, excluding the Declaration of Victoria S. Loob in Support of Objection of USA Investment Partners, LLC, Joseph Milanowski and Thomas Hantges to Confirmation of the Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization filed on December 11, 2006 (the “Loob Declaration”) (Docket No. 2051) and submit their memorandum in support herein.

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b).
2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. No prior application has been filed for the relief requested herein.

BACKGROUND

3. On or about April 13, 2006, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. The Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization (“Debtors’ Plan of Reorganization”) was filed on November 15, 2006 (Docket No. 1799).

5. On December 11, 2006, USA Investment Partners, LLC (“USAIP”), Joseph Milanowski (“Milanowski”) and Thomas Hantges (“Hantges”) filed their Objection to Confirmation of the Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization (docket no. 2051 (the “USAIP Objection”).

6. The Loob Declaration was attached as Exhibit A to the USAIP Objection.

7. On December 12, 2006, the Debtors filed their Ex Parte Application for Order Approving the Examination of Victoria Loob Pursuant to Fed. R. Bankr. P. 2004 (docket no. 2054).

8. On December 14, 2006, the Court entered its Order Requiring Victoria Loob to Appear for Examination Pursuant to Fed. R. Bankr. P. 2004 (the "2004 Order"). The 2004 Order required Victoria Loob to appear on December 18, 2006 at 9:30 a.m. prevailing Pacific Time.

9. Although Victoria Loob appeared as the 2004 Order required, she refused to testify regarding the statements made in the Loob Declaration and invoked her Fifth Amendment right against self-incrimination. A copy of the transcript from the 2004 Examination of Victoria Loob is attached as Exhibit 1.

10. The Debtors hereby requests entry of an Order pursuant to Fed. R. Civ. P. 37(b) and (d), made applicable by Fed. R. Bankr. P. 9014, excluding the Loob Declaration.

Argument

Victoria Loob and the USAIP Objection are trying to have it both ways – to have the benefit of the direct testimony contained in the Loob Declaration, while simultaneously invoking the Fifth Amendment to protect against cross-examination on the very statements contained in the Loob Declaration. However, the law has been long settled that "[o]nce the decision to testify has been made, ... the [witness] exposes himself to a full cross-examination concerning matters relevant to his direct testimony." *United States v. Panza*, 612 F.2d 432, 437 (9th Cir. 1980). The United States Supreme Court has stated:

[A] witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only his choice, but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

Brown v. United States, 356 U.S. 148, 155-56, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958). Simply put, "[o]nce he takes that stand, the [witness] may no longer refuse to answer questions regarding

unprivileged matters reasonably related to his direct testimony.” *Panza*, 612 F.2d at 438 (citations omitted).

The Ninth Circuit Court of Appeals has upheld a trial court’s decision to strike a witness’s affirmative testimony when that witness invokes the Fifth Amendment to avoid cross-examination related to the affirmative testimony. *See Panza*, 612 F.2d at 438. A trial court is given broad discretion to control the conduct of trial. “Historically the trial court’s discretion has included the power to strike the testimony of a witness who refuses to answer questions on cross-examination.” *Id.* (citing 5 Wigmore on Evidence § 1364, 1390 (Chadbourn ed. 1974); McCormick on Evidence §19 (Cleary ed. 1972)). Additionally, Fed. R. Civ. P. Rule 37(d) allows a court to sanction a party for failing to testify at a properly noticed 2004 examination by entering an “order striking out pleadings or parts thereof” filed by the offending party. Fed. R. Civ. P. 37(d) and (b)(2)(C).

In the instant case, Victoria Loob refused to testify regarding matters relevant to the statements contained in her Declaration. Indeed, Ms. Loob invoked her Fifth Amendment right when responding to questions as to whether she even recognized the Loob Declaration or if it was her signature on the Loob Declaration. *See* 2004 Transcript, p. 11 ln. 10-20 (Exhibit 1). As a result, Debtors were unable to obtain information necessary to adequately address and respond to the allegations of the Loob Declaration and the USAIP Objection. The Debtors will be unfairly prejudiced if the Court considers the Loob Declaration while at the same time the Debtors have been deprived of the opportunity to conduct discovery on the USAIP Objection. Accordingly, the Court should enter an order excluding the Loob Declaration.

Furthermore, when asked if Ms. Loob would be attending the Confirmation Hearing, Ms. Loob invoked her Fifth Amendment rights and her counsel represented that “Unless Ms. Loob receives a subpoena to appear as a witness by some party, she does not intend on appearing.” 2004 Transcript, p. 12 ln. 22-24 (**Exhibit 1**). This Court has ordered that

all declarants or affiants must appear, and be available, without need for subpoena, for cross-examination at the Confirmation Hearing (except for declarants making declarations of service). The testimony of any declarant or affiant who does not present himself or herself for cross-examination at the Confirmation Hearing will be stricken from the record and will not be considered in determining contested issues at the Confirmation Hearing, unless such party’s appearance has been excused by prior order of the Court.

Order Approving: (A) Debtors' Disclosure Statement; (B) Proposed Notice of Confirmation Hearing; (C) Proposed Solicitation and Notice Procedures; and (D) Proposed Form of Ballots, ¶ 12(b). Accordingly, the Debtors' respectfully request that the Loob Declaration be stricken on this basis as well.

Conclusion

For the reasons set forth above, Debtors respectfully request the Court enter an order excluding the Loob Declaration and for such other relief as the Court deems just and reasonable.

DATED this 18th day of December, 2006.

/s/ Jeanette E. McPherson

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“Exhibit 1”

In The Matter of:

v.

DEPOSITION OF:

Victoria S. Loob

Volume 1

December 18, 2006

Associated Reporters of Nevada

Certified Court Reporters

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Suite 770

Las Vegas, NV 89102

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Word Index Included

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:)	
USA COMMERCIAL MORTGAGE)	
COMPANY,)	
Debtor.)	JOINTLY ADMINISTERED
)	UNDER:
In re:)	CASE NO.
USA CAPITAL REALTY)	BK-S-06-10725 LBR
ADVISORS, LLC,)	
Debtor.)	
)	
In re:)	
USA CAPITAL DIVERSIFIED)	
TRUST DEED FUND, LLC,)	
Debtor.)	
)	
In re:)	
USA CAPITAL FIRST TRUST)	
DEED FUND, LLC,)	
Debtor.)	
)	
In re:)	
USA SECURITIES, LLC,)	
Debtor.)	

EXAMINATION UNDER OATH OF VICTORIA S. LOOB

Taken on Monday, December 18, 2006

At 10:56 a.m.

At 4484 South Pecos Road

Las Vegas, Nevada

REPORTED BY: MARILYN SPECIALE, CRR, RPR, CCR #749

1 APPEARANCES:

2

3 For Mesirow Financial:

4 LEONARD E. SCHWARTZER, ESQ.
Schwartzter & McPherson Law Firm
5 2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146

6

7 For USA Investment Partners:

8 DOUGLAS E. GRIFFITH, ESQ.
Kesler & Rust
9 McIntyre Building, 2nd Floor
68 South Main Street
10 Salt Lake City, Utah 84101

11 RUSSELL S. WALKER, ESQ.
Woodbury & Kelser
12 265 East 100 South, Suite 300
P.O. Box 3358
13 Salt Lake City, Utah 84111

14 For Ron Weddell & Spectrum Financial Group:

15 ELISSA F. CADISH, ESQ.
Hale Lane
16 3930 Howard Hughes Parkway
Fourth Floor
17 Las Vegas, Nevada 89109

18 For USACM Creditors Committee:

19 JOHN HINDEROKER, ESQ.
Lewis & Roca LLP
20 One South Church Avenue
Suite 700
21 Tucson, Arizona 85701

22 For First Trust Deed Committee, USA Capital Case:

23 SHLOMO SHERMAN, ESQ.
Shea & Carlyon
24 228 South Fourth Street
First Floor
25 Las Vegas, Nevada 89101

1 For Victoria Loob:

2 MARK DZARNOSKI, ESQ.
3 Gentile DePalma
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Suite 850
4 Las Vegas, Nevada 89109

5 Also Present:

6 Mesirow Financial Consulting, LLC
By: THOMAS J. ALLISON
7 Chief Restructuring Officer
321 North Clark Street
8 Chicago, Illinois 60610

9 SUSAN SMITH
Senior Vice President
10 2 South Biscayne Boulevard
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11 Miami, Florida 33131

12 JAMES ATKINSON
Senior Managing Director
13 666 Third Avenue
21st Floor
14 New York, New York 10017

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I N D E X

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Witness: VICTORIA LOOB

Page

3

BY MR. SCHWARTZER

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BY MS. CADISH

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BY MR. SCHWARTZER

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E X H I B I T S

7

Number

Description

Page

8 1

Declaration of Victoria S. Loob

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1 (Exhibit 1 was marked.)

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3 Thereupon--

4 VICTORIA LOOB,

5 was called as a witness, and having been first duly

6 sworn, was examined and testified as follows:

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8 EXAMINATION

9 BY MR. SCHWARTZER:

10 Q. Miss Loob, my name is Leonard Schwartzer. I'm
11 here to take your examination under oath pursuant to
12 Bankruptcy Rule 2004 in the cases of USA Commercial
13 Mortgage Company and its affiliates.

14 I see you're here present with your counsel,
15 Mr. Dzarnoski.

16 Is there any reason today that you can't have
17 your examination under oath taken, that you have a
18 physical disability or medical problem or anything like
19 that?

20 A. No, I don't.

21 Q. Did you receive a copy of the order for your
22 appearance today to answer questions about the debtors'
23 activities?

24 A. Yes, I did.

25 Q. Okay. What is your full legal name?

1 A. Victoria Suzanne Loob.

2 Q. And, Miss Loob, the court reporter, where
3 could she contact you; do you want it to be you or do
4 you want it to be through your attorney?

5 MR. DZARNOSKI: Through counsel, please.

6 BY MR. SCHWARTZER:

7 Q. Were you formerly employed by USA Commercial
8 Mortgage?

9 A. On the advice of counsel, I decline to answer
10 the question asserting my rights secured to me by the
11 Fifth Amendment to the United States Constitution.

12 Q. Miss Loob, were you formerly a loan servicing
13 officer and a general administrator of USA Commercial
14 Mortgage?

15 A. On advice of counsel, I decline to answer the
16 question asserting my rights secured to me by the Fifth
17 Amendment to the United States Constitution.

18 Q. Were you a signatory on the USA Commercial
19 Collection Account?

20 A. On the advice of counsel, I decline to answer
21 the question asserting my rights secured to me by the
22 Fifth Amendment of the United States Constitution.

23 Q. Are you familiar with the way USA Commercial
24 Mortgage operated the USA Commercial Mortgage Trust
25 Account?

1 A. On the advice of counsel, I decline to answer
2 the question asserting my rights secured to me by the
3 Fifth Amendment of the United States Constitution.

4 Q. Was the USA Commercial Mortgage Trust Account
5 kept as a trust account which only had the funds of
6 other parties, not the funds of USA Commercial Mortgage?

7 A. On the advice of counsel, I decline to answer
8 the question asserting my rights secured to me by the
9 Fifth Amendment of the United States Constitution.

10 Q. Prior to the filing, would USA Commercial
11 Mortgage deposit all interest and principal repayments
12 collected from borrowers on loans into the USA
13 Commercial Mortgage Trust Account?

14 A. On the advice of counsel, I decline to answer
15 the question asserting my rights secured to me by the
16 Fifth Amendment of the United States Constitution.

17 Q. Were funds from other sources, other than the
18 repayments collected from borrowers, ever deposited in
19 the USA Commercial Trust Account?

20 A. On the advice of counsel, I decline to answer
21 the question asserting my rights secured to me by the
22 Fifth Amendment of the United States Constitution.

23 Q. Were the funds in the USA Commercial Trust
24 Account only paid out to lenders according to the
25 provisions of lenders' specific loan agreements?

1 A. On the advice of counsel, I decline to answer
2 the question asserting my rights secured to me by the
3 Fifth Amendment of the United States Constitution.

4 Q. Were the funds paid in by borrowers that were
5 deposited into the USA Commercial Mortgage Trust Account
6 always disbursed to the lenders in a timely manner?

7 A. On the advice of counsel, I decline to answer
8 the question asserting my rights secured to me by the
9 Fifth Amendment of the United States Constitution.

10 Q. Were the funds on deposit in the USA
11 Commercial Trust Account every commingled with the funds
12 of USA Commercial Mortgage?

13 A. On the advice of counsel, I decline to answer
14 the question asserting my rights secured to me by the
15 Fifth Amendment of the United States Constitution.

16 Q. Were funds of USA Commercial Mortgage ever
17 deposited in the USA Commercial Trust Account?

18 A. On the advice of counsel, I decline to answer
19 the question asserting my rights secured to me by the
20 Fifth Amendment of the United States Constitution.

21 Q. On any occasion was any funds from the USA
22 Commercial Trust Account paid to USA Investment
23 Partners?

24 A. On the advice of counsel, I decline to answer
25 the question asserting my rights secured to me by the

1 Fifth Amendment of the United States Constitution.

2 Q. On any occasion were the funds in the USA
3 Commercial Trust Account ever paid to creditors of USA
4 Commercial Mortgage?

5 A. On the advice of counsel, I decline to answer
6 the question asserting my rights secured to me by the
7 Fifth Amendment of the United States Constitution.

8 Q. On any occasion were the funds in the USA
9 Commercial Trust Account ever paid to creditors of
10 Thomas Hantges?

11 A. On the advice of counsel, I decline to answer
12 the question asserting my rights secured to me by the
13 Fifth Amendment of the United States Constitution.

14 Q. On any occasion were the funds in the USA
15 Commercial Trust Account ever paid to creditors of
16 Joseph Milanowski?

17 A. On the advice of counsel, I decline to answer
18 the question asserting my rights secured to me by the
19 Fifth Amendment of the United States Constitution.

20 Q. On any occasion were the funds in the USA
21 Commercial Trust Account ever paid to yourself
22 personally?

23 A. On advise of counsel, I decline to answer the
24 question asserting my rights secured to me by the Fifth
25 Amendment of the United States Constitution.

1 Q. Did USA Commercial Mortgage ever include the
2 USA Commercial Mortgage Trust Account as an asset on any
3 USA Commercial Mortgage corporate balance sheet?

4 A. On the advice of counsel, I decline to answer
5 the question asserting my rights secured to me by the
6 Fifth Amendment of the United States Constitution.

7 MR. SCHWARTZER: I have no further questions
8 at this time.

9 I would, of course, have questions if I had
10 answers to the questions I had asked in a format that
11 was useful.

12 Does any other counsel have questions?

13 MS. CADISH: I do.

14 EXAMINATION

15 BY MS. CADISH:

16 Q. Were you formerly known as Victoria Hessling?

17 A. Yes.

18 Q. When did your name change?

19 A. I got married in 2001.

20 Q. And that's when your name changed?

21 Is that yes?

22 A. Yes, 2001.

23 Q. I think this is where my luck is going to end.
24 But how are you presently employed?

25 A. On the advice of counsel, I decline to answer

1 the question asserting my rights secured to me by the
2 Fifth Amendment of the United States Constitution.

3 MS. CADISH: I have no more questions. Thank
4 you.

5 MR. SCHWARTZER: Could we take a break?

6 (Recess taken.)

7 MR. SCHWARTZER: Two more questions.

8 EXAMINATION

9 BY MR. SCHWARTZER:

10 Q. I put in front of you what has been marked as
11 Exhibit 1 which appears to be a declaration with your
12 signature on it. Do you recognize that document?

13 A. On the advice of counsel, I decline to answer
14 the question asserting my rights secured to me by the
15 Fifth Amendment to the United States Constitution.

16 Q. Okay. Looking at Exhibit 1, is that your
17 signature on Page 3?

18 A. On the advice of counsel, I decline to answer
19 the question asserting my rights secured to me by the
20 Fifth Amendment to the United States Constitution.

21 Q. Are any of the statements in this declaration
22 true?

23 A. On the advise of counsel, I decline to answer
24 the question asserting my rights secured to me by the
25 Fifth Amendment to the United States Constitution.

1 Q. Are any of the questions -- are any of the
2 statements in the declaration false?

3 A. On the advice of counsel, I decline to answer
4 the question asserting my rights secured to me by the
5 Fifth Amendment to the United States Constitution.

6 Q. Who requested that you sign this declaration
7 that's been marked as Exhibit 1?

8 A. On the advice of counsel, I decline to answer
9 the question asserting my rights secured to me by the
10 Fifth Amendment to the United States Constitution.

11 Q. Are you going to be attending the confirmation
12 hearing tomorrow in the case of the debtors?

13 A. On the advice of counsel, I decline to answer
14 the question asserting my rights secured to me by the
15 Fifth Amendment to the United States Constitution.

16 MR. SCHWARTZER: I'd certainly disagree with
17 whether or not she will attend a hearing.

18 MR. DZARNOSKI: I'll make a representation on
19 the record if you would like.

20 MR. SCHWARTZER: I would love to have that
21 representation.

22 MR. DZARNOSKI: Yes. Unless Miss Loob
23 receives a subpoena to appear as a witness by some
24 party, she does not intend on appearing.

25 MR. SCHWARTZER: Okay.

1 I have no further questions. Thank you.

2 Does anyone else have any questions?

3 Okay. Thank you.

4 (Adjourned at 11:09 a.m.)

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1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)
3) ss.
4 COUNTY OF CLARK)

5 I, Marilyn Speciale, a duly commissioned
6 Notary Public, Clark County, State of Nevada, do hereby
7 certify: That I reported the examination under oath of
8 VICTORIA S. LOOB, commencing on Monday, December 18,
9 2006, at 10:56 a.m.

10 That prior to being deposed, the witness was
11 duly sworn by me to testify to the truth. That I
12 thereafter transcribed my said shorthand notes into
13 typewriting and that the typewritten transcript is a
14 complete, true and accurate transcription of my said
15 shorthand notes.

16 I further certify that I am not a relative or
17 employee of counsel of any of the parties, nor a
18 relative or employee of the parties involved in said
19 action, nor a person financially interested in the
20 action.

21 IN WITNESS WHEREOF, I have set my hand in my
22 office in the County of Clark, State of Nevada, this
23 18th day of December, 2006.

24

25

MARILYN SPECIALE, CRR,RPR,CCR #749